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Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 577

NATHAN W. SHAVIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH,
105 W. Adams St.,
Chicago 3, Illinois.

ANNA R. LAVIN,
209 S. La Salle St.,
Chicago 3, Illinois,
Attorneys for Petitioner.

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No.

NATHAN W. SHAVIN,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Nathan W. Shavin, prays that a writ of certiorari be issued to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, denying the petitioner's motion for acquittal after discharge of

jury, was entered on September 9, 1959, and is not reported. No opinion was filed.

The judgment order of the United States Court of Appeals for the Seventh Circuit, dismissing the appeal from said order of the District Court, was filed November 9, 1959, and is not reported, but is set forth in the Appendix hereto, and in the certified record transmitted herewith.

JURISDICTION.

This petition is filed within thirty days of the dismissal of the appeal in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Does not denial of a motion for judgment of acquittal after discharge of the jury without having reached any verdict under Rule 29 of the Federal Rules of Criminal Procedure, and without the consent of the defendant, and without urgent circumstances nor plain and obvious causes, nor manifest necessity, and which order was entered after a trial in which the evidence was not sufficient to sustain a guilty verdict, constitute a "final decision", appealable under 28 U.S.C. 1291?

2. Is not a failure of a trial Judge to perform the mandatory duty under Rule 29 to enter a judgment of acquittal, after discharge of the jury for failure to agree, where the evidence is insufficient to sustain conviction, final disposition of an established right for which remedy by appeal is appropriate corrective action? Or should the performance of the duty to

acquit imposed upon the District Judge by Rule 29 of the Federal Rules of Criminal Procedure be secured by writ of mandamus?

3. Does not the ordering of a new trial after the Government has failed to prove its case against the defendant, the creation of a new right to prosecution in violation of the ancient and constitutional doctrine that the accused shall not be put twice in jeopardy of life and limb for the same offense?

4. Where a motion for acquittal is made after all the evidence is closed, and the jury has been discharged for failure to agree, without obtaining consent of the parties, and the evidence is demonstrated by the defendant's motion, to be insufficient, and where such a motion is denied and a new trial ordered, has not the defendant, in exercise of his right to so move, been required to cooperate in his own prosecution on a second trial, by indicating deficiencies in the proof and the theory of prosecution,* for the prosecutor's correction on a second trial? Does not this produce double jeopardy?

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* "Next time I will know better and I will keep my mouth shut." (see prosecutor's closing argument, page 942 of stenographic record of proceedings).

STATEMENT OF THE CASE.

Indictment was brought against the petitioner, Nathan W. Shavin, a lawyer practicing for thirty years principally in the personal injury field, in nine counts charging him with having devised a scheme to defraud certain insurance companies and with depositing and causing deposit of letters in execution of said scheme (18 U. S. C. 341).

At the close of its evidence, the government dismissed Counts 1, 5 and 7. The defendant thereupon made a motion for judgment of acquittal which was denied. The defendant, after putting on its evidence, which was confined principally to character testimony, again moved for judgment of acquittal. The motion was denied and the remaining counts were submitted to the jury. The trial covered a period of eight days. After deliberating approximately 20 hours and reaching no verdict, the jury was discharged on July 2, 1959, on order of the Court, and on the Court's own motion, without obtaining the consent of the defendant. On the 7th day of July, 1959, within 5 days after discharge of the jury, the defendant again, pursuant to Rule 29, moved for judgment of acquittal. This motion was supplemented to allege wherein the proof as to each count was wanting, and the evidence, if any, purporting to go to each count was set forth to demonstrate its inadequacy. That motion was denied on the 9th day of September, 1959, and the cause was ordered to be tried again. Petitioner, thereupon, moved to dismiss the cause on the grounds, *inter alia*, of former jeopardy and that the indictment as found by the grand jury was no longer extant, having been modified by the prosecutor's alterations on order of the Court, over defendant's objection.

On the 18th day of September, 1959, the defendant filed his notice of appeal from the order denying his motion for acquittal after discharge of the jury. The appeal was docketed by defendant in the United States Court of Appeals for the Seventh Circuit on October 28, 1959. On October 30, 1959, the government filed its motion to dismiss the appeal on the grounds that:

1. "The final judgment in a criminal case is the sentence. . . . There has been no sentence in the present case. The order of the district court denying defendant's motion for a judgment of acquittal after discharge of the jury is not a 'final decision' within the meaning of Section 1291 of Title 28. . . ."

2. ". . . a second trial after discharge of a jury for failure to agree in the first trial does not constitute double jeopardy."

On November 9, 1959, the United States Court of Appeals for the Seventh Circuit, without assigning reasons therefor, before petitioner was given opportunity to answer and without argument written or oral, granted the motion to dismiss the appeal.

The petitioner did not seek or request the alternative of new trial.

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. There is involved herein an important question as to whether the failure of a trial judge to perform the mandatory duty under Rule 29 to enter a judgment of acquittal after discharge of the jury for failure to agree where the evidence is insufficient to convict is a "final decision" appealable under

28 U. S. C. 1291; or whether such failure is subject to any remedy.

2. There is involved herein an important question of whether discharging of a jury without having reached any verdict, but to whom all the evidence has been presented and which evidence is insufficient to support conviction, and ordering a new trial, creates double jeopardy.

I.

It is defendant's contention that denial of a motion for judgment of acquittal, after all the evidence is closed and such evidence is patently insufficient to sustain judgment is "final" and separate, complete and independent so as to warrant treatment as a plenary order. Finality as to this phase is a necessary result in all cases. We do not claim right of appeal because of facts peculiar to a particular case. This appeal satisfies the categorical terms proper to jurisdictional statutes. (Cf. *Carroll* v. *U. S.*, 354 U.S. 394, 405.)

It is the government's contention that this appeal is premature because "The final judgment in a criminal case is the sentence." (See Motion to Dismiss, p. 3). The statement is made in reliance upon *Berman* v. *United States*, 302 U.S. 211. Like reliance was the predicate of the Court's decision in *Gilmore* v. *United States*, 5 Cir., 264 F. 2d 44, cert. den. 79 S. Ct. 1126.

Mr. Justice Jackson, in concurrence with Mr. Justice Frankfurter distinguished *judgment* from *decision* as used in 28 U. S. C. 1291. Indicating the propriety of holding appeal to be a statutory right, they continued:

> ". . . While only a sentence constitutes a final *judgment* in a criminal case, *Berman* v. *United States*

302 U.S. 211, 212, 58 S. Ct. 164, 165, 82 L. Ed. 204, it is a final *decision* that Congress has made reviewable. 28 U. S. C. § 1291, 28 U. S. C. A. § 1291. While a final judgment always is a final decision there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle*, 342 U.S. 1, 12.

Unlike the Court of Appeals for the District of Columbia in the *Mack* and *Whiteside* cases,* we submit the considerations leading to the conclusions in *Stack* v. *Boyle*, *supra*, are analogous here. For if this case proceeds to new trial, and now, with the benefit of the defendant's pointing out the deficiencies of proof, judgment of guilty is entered and sentence imposed thereon, there is no opportunity for review of this order, insulated against the evidence adduced on second jeopardy. Effective review and correction on judgment after a second trial which is the purpose of § 1291, is foreclosed. This order cannot be considered as a step forward toward final disposition of the case. Nothing that can occur in further proceedings will change its present status.

The Government in the *Mack* and *Whiteside* cases has advanced the theory that this order will merge in final judgment and be rendered moot. Counsel for Mack and Whiteside have exhaustively analyzed the effect of such theory. The theory is violative of the "underlying idea . . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby . . . enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188. The government's theory does not even hold out the hope of the seeking of a remedy "at some

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*** Richard A. Mack and Thurman A. Whiteside v. United States, No. 507, October term 1959 (now pending on petition for certiorari).**

other time or in some other way" (*Perlman* v. *United States*, 247 U.S. 7, 13).

The alternative to the government's theory that this order can be reviewed after a second trial constitutes plain harassment. But, aside from that, it leaves the defendant in an unconscionable dilemma. In the Seventh Circuit, *United States* v. *Aman*, 210 F. 2d 344, is the law, and apparently represents the weight of authority. (See *Mosca* v. *United States*, 9 Cir., 174 F. 2d 448; *United States* v. *Goldstein*, 2 Cir., 168 F. 2d 666; *Hall* v. *United States*, C.A.D.C., 168 F. 2d 161; *Ansley* v. *United States*, 5 Cir., 135 F. 2d 207; *Corbin* v. *United States*, 10 Cir., 253 F. 2d 646; *Anderson* v. *United States*, 9 Cir., 253 F. 2d 419; *Jackson* v. *United States*, 5 Cir., 250 F. 2d 897; *McDonough* v. *United States*, 8 Cir., 248 F. 2d 725; *United States* v. *Thayer*, 7 Cir., 209 F. 2d 534.) That case holds that a motion for judgment of acquittal made at the close of the government's case is abandoned if the defendant thereafter offers evidence in his own behalf. Extending that reasoning to the instant circumstances, it would appear that if the question here presented is to be preserved through a second trial, defense on the second trial is precluded under prospective government interpretation of the prevailing law.

Because there is no discretion under Rule 29, since it is the law that a trial court "*shall* order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction . . .", the order denying the motion for the entry of such judgment is appealable as a "final decision" on the same reasoning this Court employed in *Stack* v. *Boyle*, 342 U.S. 1, 6. Rule 29 contains no less an interdiction and command than does Rule 46 (a) (1).

Mr. Justice Frankfurter, concurring in *Wilkerson* v. *McCarthy*, 336 U.S. 53, spelled out the function of a judge on a jury trial:

> "Trial by jury as guaranteed by the Constitution of the United States and of the several States presupposes a jury under proper guidance of a disinterested and competent trial judge. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 51 S. Ct. 383, 75 L. Ed. 857. It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict may be fairly based. . . . The easy but timid way out for a trial judge is to leave all cases tried by a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." (pp. 64-65).

The District Court's action upon this application is concluded and closed and in that sense its decision was final before this appeal was taken.

> "At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U. S. C. § 1291, 28 U. S. C. A. § 1291, provides, as did its predecessors, for appeal only 'from all final decisions of the district courts,' except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

"The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569, 7 L. Ed. 265; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 414, 46 S. Ct. 144, 145, 70 L. Ed. 339; *Cobbledick* v. *United States*, 309 U. S. 323, 328, 60 S. Ct. 540, 542, 84 L. Ed. 783." (69 S.

Ct. 1221, Pp. 1225, 1226)." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 at 546.

To the same effect:

Tomlinson v. *Poller*, 5 Cir., 220 F. 2d 308, 310-311.

When the motion for a judgment of acquittal was made, the trial judge, as a matter of law, should have entered it. "The right of appellant to a verdict of acquittal fully matured when he made his motion." *Karn* v. *United States*, 9 Cir., 158 F. 2d 568, 573. The trial judge, when faced with a motion for judgment of acquittal must decide a question of law. That question is whether there is evidence from which the jury reasonably could find a verdict.

II.

It must be remembered that this appeal is not predicated on a simple failure of a jury to agree, but upon a failure of the prosecution to adduce sufficient evidence to convict and upon the refusal of the original jury to convict. To overcome the constitutional prohibition against double jeopardy, the government relies on a line of cases, of which *United States* v. *Perez*, 9 Wheat. 579 is leading. The Ninth Circuit took occasion to review those cases in *Cornero* v. *United States*, 48 F. 2d 69:

> ". . . We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. An examination of the cases cited will disclose the fact that no court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, the failure of the district

> attorney to have presented sufficient witnesses or evidence to prove the offense charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case . . ." (p. 71.)

It appears to be the law that a second trial may be ordered if it is determined that a manifest necessity for disbanding prior to determination of the cause was compelled by attendant circumstances. *United States* v. *Perez*, 9 Wheat. 579, 580. The circumstances of this case do not require new trial to serve the ends of justice. New trial can only serve to defeat the ends of justice, where on the first trial the evidence was insufficient to convict. Is the power to order new trial exercised with the requisite caution when the motivating express purpose of the trial judge is that some of the jurors thought the defendant guilty? What are the urgent circumstances and the plain and obvious causes necessary to proper exercise of the power? Where is the proper exercise of judicial power that is motivated on a legal question by what some of the fact-finders thought? Unless conditions non-existent in petitioner's case are present it is not within the scope of the *Perez* decision.

The government takes the position that whenever a jury is hung, new trial must ensue in the absence of voluntary dismissal. That is not the law as laid by this Court in *Green* v. *United States*:

> "Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged

without his consent he cannot be tried again. *Wade* v. *Hunter*, 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974; *Kepner* v. *United States*, 195 U. S. 100, 128, 24 S. Ct. 797, 804, 49 L. Ed. 114. In general see American Law Institute, Administration of The Criminal Law: Double Jeopardy 61-72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689, 69 S. Ct. 834, 837, 93 L. Ed. 974." *Green* v. *United States*, 78 S. Ct. 221, 224. (Emphasis supplied.)

This record discloses no such manifest necessity comparable to that found in *Wade* v. *Hunter*, 336 U. S. 684 (though there, too, there was a notable dissent).

The appellant does *not* contend that a convicted defendant, even one who should have been acquitted by the trial court at the close of the Government's case, is in a position to complain if the trial court or the appellate court grants only one prayer of a "motion to set aside the verdict of guilty * * * and to enter a judgment of acquittal, or, in the alternative, to grant * * * a new trial." See *United States* v. *Swidler*, 207 F. 2d 47 (C. A. 3 1953), cert. den. 346 U. S. 919 (1953). It has long been recognized that a convicted defendant will waive his right to be free from a second jeopardy whenever he asks solely or alternatively for a new trial. As was held in *Bryan* v. *United States*, 338 U. S. 552, 560 (1950):

"A new trial was one of the remedies which petitioner sought. He properly gave the District Court

> an opportunity after verdict to correct its error in failing to sustain his motion for a judgment of acquittal at the conclusion of all the evidence, which claimed error was assigned as a ground for a new trial."

Appellant has never asked for and does not want a new trial. His position is then quite distinguishable from that of the defendants in *Swidler* v. *United States*, *supra*, and *Bryan* v. *United States*, *supra*. That this is a valid and vital distinction was acknowledged by Mr. Justice Douglas, concurring in the *per curiam* reversal in *Sapir* v. *United States*, 348 U. S. 373, 374 (1955):

> "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just."

It is apparent that a second trial may be ordered where the right against double jeopardy is waived by direct or indirect suit of petition for new trial. No such waiver is to be found on this record. The jury was discharged without the consent of the defendant. He never sought a second trial. The jury was given full opportunity to return a verdict and no extraordinary circumstances prevented it from doing so. *Green* v. *United States*, 355 U. S. 184, 191.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

MAURICE J. WALSH AND
ANNA R. LAVIN,
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Monday, November 9, 1959

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12814 vs.	
NATHAN W. SHAVIN, Defendant-Appellant.	

This matter comes before the Court on the motion of the United States of America to dismiss appeal, the motion of defendant-appellant to reserve hearing and decision upon the motion to dismiss appeal until consideration of the briefs and arguments of the parties on the merits, etc., and the answer of the Government to defendant-appellant's motion to reserve hearing and decision.

On consideration whereof:

It Is Ordered and adjudged by this Court that the motion of the United States of America to dismiss appeal be granted, and this appeal from an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered therein on September 9, 1959, be and the same is hereby, Dismissed.